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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners

v.

BRIDGET C. MERGENS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR TARA LYNN BURR, ET AL., AND RICHARD GARNETT, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address only the following question, arising under the Equal Access Act, 20 U.S.C. §§ 4071-4074:

Whether public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

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INTEREST OF AMICI CURIAE

Amici are public high school students in Buffalo, New York, and Renton, Washington, who—like respondents in this case—are involved in litigation with their school districts because they requested permission to meet together voluntarily in an empty classroom outside of school hours to study the Bible, discuss religious and moral issues, and pray. The *Burr* case is presently in the discovery phase in the Supreme Court for the State of New York, *Board of Education* v. *Burr*, No. 11097/88 (filed Nov. 15, 1988). The *Garnett* plaintiffs have recently filed a petition for a writ of certiorari (No. 89-641) to review the judgment of the Ninth Circuit in their case. *Garnett* v. *Renton School District*, 874 F.2d 608 (1989).

The purpose of this brief is to urge the Court, in deciding this case, to lay down principles for the application of the Equal Access Act that will guide students and school administrators across the nation who are embroiled in controversy over voluntary, student-initiated religious discussions on high school campuses.

The United States has consented in writing to the filing of this brief. A copy of that consent letter is being filed with this brief. All other parties filed a blanket consent letter on July 15, 1989, authorizing any party to file a brief as *amicus curiae*.

STATEMENT OF THE CASE

Westside High School is a typical public high school, with the typical range of extracurricular activities organized by and for students. These include some activities organized and controlled by the school—sports teams, the National Honor Society, the band, and others. These also include activities organized and led by students, with only minimal supervision by the faculty "sponsor." These include social and service clubs, chess club, drama club, and others. At Westside High School, like many other high schools in other parts of the country, a small group of students requested to meet in empty classrooms before or after school, on equal terms with other student groups, to discuss matters they consider central to their lives both at school and elsewhere. The response of the Westside High School officials was, unfortunately, also typical. They deemed the subject matter of the students' speech—religion—inappropriate to the forum of a public school, and denied the students' request to meet.

This case presents each of the factual elements necessary to state a claim under the Equal Access Act, 20 U.S.C. §§ 4071-4074. Respondents asked to form a club "identical in its formation, rights, privileges, terms and conditions" to the 30 student clubs already existing at Westside High School, except without a faculty sponsor. J.A. 59 (Pretrial Uncontroverted Facts ¶ 13). The proposed group is voluntary, student-initiated, student-run, and open to any student who wants to join. J.A. 73-74, 76, 112, 119, 133-34, 144, 154, 155, 164-65, 189, 211. Students at Westside are permitted to initiate organizations and to meet on the premises of the school for a wide variety of purposes. J.A. 240-41, 291, 479-487 (list of student groups). Indeed, organizations are initiated more often by students than by faculty. J.A. 358. Many of these student-initiated, student-run organizations have no direct relation to courses offered at the school. J.A. 124, 143, 148-49, 193, 220-22, 225-26, 227-28, 229-30, 231, 232-33, 368-69. School officials refused Bridget Mergens and her group permission to meet on the basis of the content of their proposed speech. J.A. 246, 340-341, 349, 364.

Since these facts are established on the record, all that remains is a question of law—whether the court of appeals applied the correct legal standard under the Equal Access Act and the First Amendment to the facts just stated. Nonetheless, it is necessary to correct three factual misimpressions that may have been created by petitioners and their supporting *amici*, and that obscure the legal issues.

1. It is not true that respondents have been free to meet as a group on school grounds, "informally" or otherwise. See Pet. Br. 6, 13, 82. The record shows that the staggered schedule of classes at Westside High School precluded any group larger than four or five students from gathering together at any time other than before or after school; respondents' group had 20 to 25 members. J.A. 77, 112-113. To hold a meeting on a regular basis before or after school requires the permission of school administrators. J.A. 432-33, 452, 453-54. The principal testified that he would not allow any group, even a checkers club, to meet regularly without official sponsorship. J.A. 453. Since that permission was withheld (J.A. 246, 317-19, 454), it was impossible for the group to meet at Westside High School, at least without "sneaking around be-

hind the administration's back" (J.A. 113).[1] Allowing snippets of conversation in the hallways or at lunchtime is no substitute for a regular meeting. As Bridget Mergens testified, "There would have been no way that all the kids could have gotten together at the same time. Mostly any conversation about any religious matters was one on one or two on two or about four or five kids at the most." J.A. 112-113. The students in this case are no more free to meet than were the students in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), or *Healy* v. *James*, 408 U.S. 169 (1972).[2]

2. The second, and related, point that must be corrected is petitioners' insistence (Pet. Br. 7, 31, 83-84) that respondents sought official endorsement of their proposed club. The students unequivocally stated precisely the opposite. For example, Bridget Mergens described her request to the principal, Dr. Findley, in these words:

> I simply wanted to be able to start a group, just not even start an official group, but just have a group of kids that were allowed to meet in the school, on the—on the campus in noninstructional time and be

[1] The Equal Access Act was intended to remedy situations like that in Sonoma, California, in which a school board voted to prohibit students from meeting for religious speech but also told the students that they could continue to meet "underground" despite the prohibition. S. Rep. No. 357, 98th Cong., 2d Sess. 13 (1984).

[2] Nor was the principal's suggestion that the students meet at a nearby church with which school officials have "a good relationship" (J.A. 285, 81-83; Pet. Br. 8) an acceptable alternative. The students want to discuss how their beliefs relate to their experiences at school (see, *e.g.*, J.A. 75); thus to meet in that setting is an important element of their speech. Moreover, respondents sought to form a nondenominational group, an intention inconsistent with meeting in or under the auspices of a particular church. It is highly inappropriate for school officials to play any role in endorsing, let alone choosing, a particular church as an appropriate meeting place. In any event, the existence of an alternative, even if appropriate, is legally irrelevant to their right to meet in this forum. *Healy* v. *James*, 408 U.S. 169, 183 (1972); *Schneider* v. *New Jersey*, 308 U.S. 147, 103 (1939).

> able to get together with Christian friends and just have fellowship.

J.A. 80-81. Michelle Harris, another member, stated:

> I would like us to be recognized whether we're endorsed or not. They don't necessarily have to say that they agree with the people but to allow them to be able to meet, I would like to see that.

J.A. 156. Indeed, the students were willing to have the school post an official disclaimer of endorsement, if that is what it took to meet. J.A. 72-73, 156.[3] Students with little or no interest in the religious discussion group testified that they would perceive no school endorsement if the club were formed on the same terms as other clubs. J.A. 211-212, 214-215.

The only evidence of respondents' desire for official endorsement cited by petitioners or their supporting *amici* is the request for official "recognition" (see J.A. 244). But since the school administrators refused to allow "unrecognized" student groups to meet on a regular basis in empty classrooms before or after school, this request was no more than a request to meet. It is the school —not the students—that insists upon tying endorsement to equal access.

The School Board evidently has an exaggerated notion of the value that teenagers place on their endorsement and approval. Respondents, like *amici*, do not care about the school's endorsement. As the record shows, all they seek is an equal opportunity to meet.

3. Contrary to petitioners' claim (Pet. Br. 87-88), the record shows that other student clubs are allowed to meet without the active participation or control of faculty sponsors. Many sponsors leave the conduct of club meet-

[3] Some of the students believed they should be given the same privilege as other student groups to use the school bulletin boards, newspaper, or P.A. system to publicize their meetings (J.A. 119, 132-133, 141, 155); but other members would find it "acceptable" if they could simply meet without obtaining access to these media (J.A. 104-105; see also *id.* at 155, 156).

ings to students (J.A. 93, 192), and either do not attend at all (*e.g.*, J.A. 92-93) or, at most, stand by to take attendance and ensure discipline or safety (J.A. 119, 124, 167). The degree of involvement is left to the "discretion . . . of the club sponsor" (J.A. 260). To allow respondents to meet alone, or with a faculty member serving only as a nonparticipating monitor, would *not* "radically restructure the forum," as petitioners contend (Pet. Br. 54). The structure already varies from club to club according to the nature of the activity. J.A. 260.

INTRODUCTION AND SUMMARY OF ARGUMENT

High school is a time of intellectual, social, and spiritual awakening, when students begin to question the norms that govern life around them and to develop for themselves the habits of mind and spirit that will guide them for the rest of their lives. High school students begin to understand themselves as part of a wider community, with ties and responsibilities to friends, nation, and world. Thus, at Westside, like other high schools, we see students wanting to form social and service clubs and pursuing idealistic and unconventional objectives. Moreover, young people use the experience of fellowship and interaction with others to explore and test new ideas and convictions. This is particularly important for students—like respondents and these *amici*—whose point of view is out of the mainstream and often the butt of ridicule or hostility. For them, the opportunity to gather together and share their ideas with fellow students is an indispensable support for their individual consciences against the pressures of the secular environment in which they find themselves.

Most high schools in the United States today recognize the importance of voluntary, student-initiated activities, and make it possible for students to meet in empty classrooms before or after school, and sometimes during the day in unstructured extracurricular activity periods. But some schools, like Westside, have selectively restricted this access when the subject the students wish to discuss

is their religion. The reasons are many. Some school officials entertain the common, but mistaken, belief that religion must be "kept out of the schools" in all circumstances on account of the Establishment Clause. Petitioners' brief shows that Westside school officials share this assumption. Pet. Br. 81-88. Some school officials refuse student requests to meet because of the threat of lawsuits from well-financed organizations that oppose the concept of equal access. Some respond to community pressure from those who think that high school students who wish to study and discuss the Bible must be intolerant, bigoted, and closed-minded. We suspect this is what petitioners must mean when they state that the proposed religious discussion group is "unreflective of the community values [the school board] espouses" (Pet. Br. 84). Whatever the reason or combination of reasons, high school officials in many communities have shut the door to students on the basis of the religious content of their speech. See S. Rep. No. 357, 98th Cong., 2d Sess. 6 (1984).

Controversies over voluntary, student-initiated religious discussion groups have perplexed and harried school administrators, even as these officials have frustrated and censored the speech of the students. There is a grave need, on both sides, for clear and authoritative legal guidance. Petitioners have chosen to argue this case in a highly fact-specific manner, as if *certiorari* had been granted to review the Eighth Circuit's approach to consideration of assertedly factual questions (*e.g.*, Pet. Br. 25-26, 43, 91). *Amici* submit this brief to emphasize the issues of law common to this and other cases under the Equal Access Act.

The existence of a "limited open forum" depends upon objective facts, to be evaluated in light of congressional standards, and not on the stated intentions or educational philosophy of the school board. Under the Equal Access Act, the prohibition on content-based discrimination (20 U.S.C. § 4071(a)) is triggered whenever a

federally-funded public school allows meetings by "one or more noncurriculum related student groups" (*id.*, § 4071 (b)). By "curriculum" Congress meant the actual courses offered by the school; any definition based on the general "mission and goals" of the school would render the Act meaningless.

Having allowed one or more noncurriculum related student groups to meet, the school board is not free to deny permission to another group on the basis of the content of its speech. It may not deny permission to meet on the ground that the group's speech is likely to be "controversial" or not likely to be "balanced." It may not deny permission to meet on the ground that the group's speech would make an active faculty sponsor inappropriate; the Act requires, instead, that the board confine faculty involvement to a neutral monitoring function. And it may not deny permission to meet on the ground that allowing a meeting would connote "endorsement" or the appearance of endorsement. That theory directly contradicts the fundamental premises of the Equal Access Act: that nonpreferential access to meeting space does *not* connote endorsement, that high school students are capable of distinguishing between permission and endorsement, and that content-based exclusion is more likely to be reasonably perceived as hostility than equal access is to be reasonably perceived as endorsement.

ARGUMENT

THE EQUAL ACCESS ACT PROTECTS THE RIGHT OF A VOLUNTARY, STUDENT-INITIATED RELIGIOUS GROUP TO MEET ON SCHOOL GROUNDS ON THE SAME TERMS AS OTHER STUDENT GROUPS.

Congress passed the Equal Access Act in 1984 in response to widespread reports that public high school officials (often under threat of litigation) were discriminating against student groups who wished to meet on campus for religious discussions. After extensive investigation of equal access controversies and of the perceptions and ma-

turity level of high school students, as well as reflective consideration of the constitutional issues, Congress concluded that a clear, objective remedy is needed to enforce the free speech rights of high school students, similar to the rights already recognized by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), at the university level. See S. Rep. No. 357, 98th Cong., 2d Sess. (1984); H.R. Rep. No. 710, 98th Cong., 2d Sess. (1984).

That remedy was the Equal Access Act, 20 U.S.C. §§ 4071-4074. Under the Act, any federally-funded public high school "which has a limited open forum" is prohibited from denying "equal access or a fair opportunity" to any students "who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content" of their speech. *Id.*, § 4071(a). There is no question in this case that Westside school officials denied permission to respondent Bridget Mergens and her group to meet on the basis of the content of their proposed speech. The only legal issue is whether the extracurricular clubs and organizations allowed by the school triggered application of the Act.

A. The Protections Of The Equal Access Act Are Triggered By "One Or More" Noncurricular Groups, Without Regard To The School Board's Intent

The congressional sponsors deliberately drafted the Act to have a clear, objective scope of application, "triggered by what a school does, not by what it says." 130 Cong. Rec. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy, explaining reasons for final modifications in the definition of "limited open forum").[4] The Act's prohibition on content-based discrimination applies whenever a school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time" (20 U.S.C. § 4071(b)). The term "meeting"

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[4] All the citations to the Congressional Record in this brief will be to the daily edition, since no final edition was produced for this period.

is statutorily defined to include student group activities that are "not directly related to the school curriculum" (*id.*, § 4072(3)). The question, then, is whether any *one* of the student-initiated groups at Westside is not "directly related to the school curriculum."

Application of the Act does *not* depend, as petitioners contend, on whether the school board exercises control over which groups can meet (Pet. Br. 40), on whether the school allows " 'indiscriminate use' of its facilities by student organizations" (Pet. Br. 41), on the school board's "intent to permit unrestricted speech" (Pet. Br. 42, 43), or on whether the school board's supposed "educational justification[s]" for suppressing speech are "pretextual" (Pet. Br. 44).[5] It depends entirely on "what a school does"—namely, whether it allows "one or more" noncurricular groups to meet. If it does, then the Act applies. The school board's intentions are wholly irrelevant.

Petitioners contend, remarkably, that Congress's definition of a limited open forum ("one or more noncurriculum related student groups") is "obscure," and should be disregarded in favor of more congenial language from constitutional cases. Pet. Br. 60 n.24. But Congress chose the "careful wording" of this definition for the express purpose of preventing school boards from circumventing the Act by making an "official decision" not to have a limited open forum and to retain control of student groups "on a case-by-case basis." 130 Cong. Rec. S8341 (June 27, 1984) (Sen. Leahy). Petitioners are asking this Court to sanction precisely the policy that the sponsors of the Act sought to forbid.

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[5] These various standards are proposed by petitioners in the section of their brief entitled "WHS's School Activities Program Is Not A Limited Public Forum" (Pet. Br. 38). Since petitioners contend that the statutory standard under the Equal Access Act is the same as the constitutional standard (Pet. Br. 59-60 n.24), these standards must apply in their eyes to the Act as well as to the Constitution.

An early version of the Act, H.R. 4996, would have been triggered if a school allowed "non-school sponsored" groups to meet. In hearings, Representative Goodling (one of three main sponsors of the Act in the House) voiced concern that such language would unacceptably limit the intended scope of the Act. As a former school administrator, high school principal, and teacher,[6] he recognized that some school administrators (like petitioners here) were prone to consider any student activity given permission to meet as "school-sponsored," contrary to the intent of the legislation. *Religious Speech Protection Act: Hearings on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 14-15 (1984). In response, Representative Bonker emphasized that the opportunity for students to initiate groups is the key to determining whether the prohibition on content-based discrimination is triggered. *Id.* See also *id.* at 52 (testimony of Prof. Laurence Tribe) ("nonschool-sponsored" should be interpreted to include "student-initiated" groups); 130 Cong. Rec. S8342 (June 27, 1984) (statement of Sen. Hatfield) (initiation of groups by the students is the "triggering mechanism" of the Act). If a school allows students to initiate their own groups, as opposed to permitting only school-initiated, faculty-directed groups, then it has a "limited open forum" and may not discriminate on the basis of the religious, political, philosophical, or other content of the student groups' proposed speech. As already noted and as petitioners concede,[7] the student clubs at Westside often are initiated by the students.

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[6] 130 Cong. Rec. H3868 (May 15, 1984) (statement of Rep. Goodling) ("I have been a superintendent for 7 years, I have been a high school principal for 10 years, and so any legislation that comes before the Committee on Education and Labor, I want to make very, very sure that as a matter of fact it helps local school districts, it does not hinder local school districts.")

[7] See Statement of the Case, *supra*, at 3, for supporting citations to the record, and Pet. Br. 44 for petitioners' concession.

Petitioners' only argument for disregarding the statutory "one or more" groups language, other than to call it "obscure," is that the statutory term "limited public [sic] forum" is a "term of art," taken from this Court's constitutional cases, and should be interpreted in the same way. Pet. Br. 59-60 n.24. Petitioners seem not to have noticed that the statute uses a *different* term: "limited *open* forum." Their argument thus rests upon a *misquotation* of the statute.

Contrary to petitioners' claim, the Equal Access Act uses a broader, more objective test for a "limited open forum" than the courts have adopted in the constitutional context. While this Court has held that under the First Amendment, "selective access does not transform government property into a public forum," *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983), the Equal Access Act provides that the grant of access to a *single* noncurriculum related group creates a "limited open forum."[8] This is entirely appropriate. Congress, unlike the courts, is a democratically-elected body with authority to regulate the activities of institutions receiving federal funds. It does not share the courts' proper jurisprudential reluctance to overturn the decisions of locally elected school boards; it can adopt clearer, more sweeping remedies for what it perceives as a persistent practice of violating the constitutional rights of high school students. Cf. *Honig* v. *Doe*, 108 S. Ct. 592, 596-97 (1988) (enforcing congressional protections for the educational rights of handicapped children); *Katzenbach* v.

[8] See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. L. Rev. 1, 36 (1986) (the statutory definition "resembles the constitutional concept of 'limited public forum,' but it goes well beyond the Supreme Court's cases"). Notwithstanding the difference in standards, we agree with the court of appeals that petitioners' actions in this case violated respondents' constitutional rights. But since any violation of the Free Speech Clause in this context would be a violation of the Equal Access Act as well, there is no need for this Court to reach the constitutional question.

Morgan, 384 U.S. 641 (1966) (enforcing congressional protections for voting rights). Furthermore, a major impetus for the Act was to end any possible uncertainty on the part of school administrators and students as to the legal status of students' extracurricular speech, particularly religious speech. See S. Rep. No. 357, *supra*, at 11-14. Therefore, Congress took the practical step of substituting a clear and objective standard. Petitioners' attempt to return to the subjective standard of the constitutional cases should be rejected.

B. "Noncurriculum Related Groups" Are Those Student-Initiated Groups That Have No Direct Relation To Courses Offered At The School

A "limited open forum" exists under the Act only if one or more of the groups allowed to meet is "noncurriculum related" (20 U.S.C. § 4071(b)). While the term is not expressly defined by the statute, we would suggest several criteria for such a definition: (1) the definition should be based on Congress's understanding of the term; (2) the definition should be based on the ordinary meaning of the term in the English language; and (3) the definition should be designed to achieve, not to frustrate, the purposes of the Act. Petitioners' proposed definition fails in all three respects: it ignores explanations by congressional sponsors, it flies in the face of ordinary English usage, and it is so subjective and self-referential that it would, as the court below held (Pet. App. A12), render the Act "meaningless."

1. *Petitioners' proposed "local definition" of "curriculum" would render the Equal Access Act meaningless*

Petitioners contend that the Act must be interpreted "to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse" (Pet. Br. 63). In particular, petitioners reject the notion that "curriculum" refers narrowly to

the actual courses offered by the school and claim instead that it encompasses anything that contributes to the school board's "missions and goals" (Pet. Br. 30). Since their "missions and goals" are entirely self-defined, this amounts to an assertion that "curriculum" means whatever the school officials say it means.

This is borne out in actual application. Petitioner James Findley, principal of Westside, testified that he considered the curriculum to include "all the activities and clubs." J.A. 220. The following exchange occurred on cross-examination:

> Q. So just the very fact that it's a club at Westside High School makes it curriculum, in your opinion, is that correct?
>
> A. The fact that it's a club grows out of mission and goals for us, and what I believe parents expect or would think appropriate to offer, yes.

Id. Principal Findley went on to note that "a lot of activities are provided for young people to become involved and feel good about themselves"; that "kids who are really successful in school are also heavily involved in activities"; and "[s]o to just be in an activity itself, we have always felt it is important to the curriculum of Westside High School." J.A. 221. Under this standard, any group the school allows to meet is by definition "curriculum related" and the Equal Access Act would never apply.

Petitioners' definition would make the Equal Access Act meaningless. The Act rested on the premise that school authorities could not be fully trusted to treat student speech even-handedly. See, *e.g.*, S. Rep. No. 357, *supra*, at 11 ("many school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech"); accord H. Rep. No. 710, *supra*, at 3, 6. Obviously, a school district that wishes to perpetuate its content-based discrimination can continue to do so if it has the power to decide for itself

whether it is subject to the Act. Because of this concern, members of Congress intended the Act to "speak[] with clarity about what a limited open forum means." 130 Cong. Rec. S8341 (June 27, 1984) (Sen. Leahy); accord *id.* at S8362 (Sen. Dole). Of course, school officials have the power to determine the contours of their curriculum—what courses to offer. Congress, however, legislated with respect to student *clubs*, and the policy embodied in the statute must be given effect. *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 (1981) (citations omitted) (in construing a statute, the Court "should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other' "); *United States* v. *Euge*, 444 U.S. 707, 715 (1980) (citation omitted) (Court should refuse to construe statute "in a manner that would 'stultify enforcement of federal law' ").

As petitioners indicate (Pet. Br. 68-69), their self-referential definition of "curriculum related" was accepted by the Ninth Circuit in *Garnett* v. *Renton School District*, 874 F.2d 608, 614 (9th Cir. 1989), *petition for certiorari pending*, No. 89-641, which accordingly rejected *amici* students' equal access claims on facts virtually indistinguishable from these.[9] The difference in result between this case and *Garnett* underscores the im-

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[9] The school official's standard for "curriculum relatedness" in *Garnett*, quoted and approved by the district court and affirmed by the court of appeals, was as follows:

> The public high school curriculum, for that matter the curriculum of a school district, is the educational program which consists of all of those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors.
>
> * * * *
>
> Beyond that then, the curriculum is what the local school board says it is.

Garnett v. *Renton School District*, 675 F. Supp. 1268, 1271 (W.D. Wash. 1987), aff'd, 874 F.2d 608 (9th Cir. 1989) (quoting Baumgartner Dep. at 6, 8).

portance of a clear, objective legal standard. When school boards are permitted to use their own "local definitions," they can ensure that the Act will not apply; where an objective definition is used, the congressional purpose of preventing content-based speech discrimination is achieved.

2. *The congressional understanding of the term "curriculum related" is limited to activities closely tied to actual coursework*

As both sponsors and opponents of the Equal Access Act acknowledged, the definition of "noncurriculum related" student groups must be "fairly broad." See 130 Cong. Rec. S8342 (June 27, 1984) (Sens. Hatfield and Gorton). It follows that the antonym, "curriculum related," must be narrowly construed. For a group to be "curriculum related" there must be a close connection between the activity and actual coursework. This requirement is reflected in the statutory language itself. The Act defines a "meeting" as activities that are "not *directly* related to the school curriculum" (20 U.S.C. § 4072(3) (emphasis added)).

Representative Goodling addressed the definition of "noncurriculum related" in a colloquy on the floor of the House. Central to his definition was the question: "does the school or a schoolteacher require or directly encourage student participation in such group in connection with curriculum course work?" If so, then the "equal access policy would not be triggered." 130 Cong. Rec. H7732 (July 25, 1984). Senator Hatfield, the chief Senate sponsor, made much the same point when he explained that "curriculum related" activities are those that are an "extension of the classroom." 130 Cong. Rec. S8342 (June 27, 1984). These statements show that Congress used the word "curriculum" in accordance with its ordinary usage and meaning—actual courses—rather than in the specialized sense it is given by some educational theorists.[10]

[10] An expert witness on curriculum, Dr. Ward Sybouts, testified about the different interpretations of "curriculum" in educational theory and stated that Congress used the term as "consisting of courses that are offered by the school." J.A. 408. He stated that under the "broad theory" employed by many educational theorists and advocated by petitioners here, "just about anything could come under the school program or curriculum" (J.A. 417), including a Bible study club (J.A. 418).

Random House Dictionary defines "curriculum" as "the aggregate of courses of study given in a school,"[11] and *Webster's Third International* gives as the first definition: "the whole body of courses offered by an educational institution."[12] Contrary to petitioners' interpretation, the Equal Access Act is triggered whenever a school allows students to initiate clubs or activities that are not either "required" or "directly encouraged" in connection with classes offered at the school. A loose connection to the school's "goals" or "mission" is not sufficient.

The legislative history contains numerous examples of groups that would typically trigger the prohibition on content-based discrimination. The most commonly invoked example was a chess club.[13] Senator Hatfield said he could not "readily conceive of a criterion that could be used at this time to establish [chess club] as a curriculum-related activity," though he admitted with irony—and

[11] *Random House Dictionary of the English Language* 492 (2d ed. 1987).

[12] *Webster's Third International Dictionary* 557 (1986) (first definition). *Webster's* gives as its third definition something akin to petitioners' definition: "all planned school activities including besides courses of study organized play, athletics, dramatics, clubs, and home-room program." *Id.* Under this definition, clubs are part of the curriculum; the phrase "noncurriculum related clubs" would be a contradiction in terms.

[13] See 130 Cong. Rec. S8335 (June 27, 1984) (statement of Sen. Denton); *id.* at S8359 (statement of Sen. Biden); *id.* (statement of Sen. Nickles); *id.* at S8361 (statement of Sen. Jepsen); *id.* at S8364 (statement of Sen. Thurmond); *id.* at S8366 (statement of Sen. Grassley); *id.* at S8368 (statement of Sen. Evans); 130 Cong. Rec. H7734 (July 25, 1984) (statement of Rep. Smith); *id.* at H7737 (statement of Rep. Emerson).

foresight—that "as long as you have lawyers, they can find ways of doing things one way or another." 130 Cong. Rec. S8342 (June 27, 1984); *cf.* Pet. Br. 64-65 (denying that Senator Hatfield's statement about a chess club is "unequivocal"); *id.* at 75-76 (arguing that the chess club is "curriculum related" because it "contribute[s] to academic performance"). Other examples of noncurricular activities given by legislators included service clubs,[14] political activities,[15] philosophy,[16] music,[17] photography,[18] ethics,[19] business clubs,[20] sports clubs,[21] Key Club,[22] drama club,[23] math club,[24] stamp club,[25] debate,[26] groups fundraising for charities,[27] aerobics,[28] private social organizations,[29] Hi-Y,[30] and card club.[31] While *amici* do not contend that each of these groups would necessarily always be noncurriculum related, they demonstrate the breadth of the definition Congress had in mind and decisively refute petitioners' suggestion that any and all activities in the school are part of the curriculum. A number of the groups at Westside were among those specifically mentioned in the legislative history: a chess club, service clubs, a sports club (Subsurfers), private social clubs (Interact and Zonta), an equivalent to the Key Club, a math club, and a business club (Future Business Leaders of America).

[14] *Id.* at S8359 (Sen. Nickles) (June 27, 1984); *id.* at H7735 (July 25, 1984) (Rep. Bonker).

[15] *Id.* at S8335 (June 27, 1984) (statement of Sen. Denton); *id.* at S8337 (statement of Sen. Hatfield).

[16] *Id.* at S8335 (Sen. Denton); *id.* at S8337 (Sen. Hatfield); *id.* at S8358 (Sen. Biden); *id.* at S8364 (Sen. Thurmond).

[17] *Id.* at S8337 (Sen. Hatfield).

[18] *Id.* at S8337 (Sen. Hatfield); *id.* at S8365 (Sen. Baucus); *id.* at H7730 (July 25, 1984) (Rep. Clinger).

[19] *Id.* at S8354 (June 27, 1984) (Sen. Levin).

[20] *Id.* at S8358 (Sen. Biden).

[21] *Id.* at S8359 (Sen. Biden); *id.* at H7737 (July 25, 1984) (Rep. Emerson).

[22] *Id.* at S8359 (June 27, 1984) (Sen. Nickles); *id.* at H7735 (July 25, 1984) (Rep. Bonker).

[23] *Id.* at S8360 (June 27, 1984) (Sen. Mattingly); *id.* at S8364 (Sen. Thurmond).

[24] *Id.* at S8360 (Sen. Mattingly).

[25] *Id.* at S8361 (Sen. Jepsen); *id.* at S8367 (Sen. Gorton).

[26] *Id.* at S8368 (Sen. Evans); *id.* at H7732 (July 25, 1984) (Rep. Lloyd).

[27] *Id.* at H7726 (Rep. Roukema).

[28] *Id.* at H7727 (Rep. Roukema).

[29] *Id.* at H7732 (Rep. Goodling).

[30] *Id.* at H7735 (Rep. Bonker).

[31] *Id.* at H7834 (Rep. Siljander).

3. *One or more of the student-initiated activities at Westside was noncurriculum related*

School administrators in this case were not able to show that participation in most of the student activities at Westside was required or directly encouraged in connection with course work. They testified that participation in the extracurricular activities of the band, choir, and orchestra was required in connection with those courses. J.A. 219, 224-225, 228-229, 303. However, testimony by both school administrators and student participants showed that participation in chess club, Interact, Zonta, computer club, Future Business Leaders of America, drama club, international club, peer advocates, Junior Classical League, math club, and Subsurfers, among other activities, did not affect the grade or academic credit one received in any specific course. J.A. 124, 148-49, 193, 220-22, 225-26, 227-28, 229-30, 231, 232-33, 368-69. Petitioners offered no evidence that teachers "directly encouraged" participation in any of these clubs in connection with actual classes—and for many of the clubs such "direct encouragement" is highly improbable. All peti-

tioners can say in their brief is that "WHS actively encourages participation in its entire student activities program" (Pet. Br. 72); but this falls far short of a showing that each and every club was "directly encouraged" in connection with "curriculum course work."

Many of the clubs at Westside have only the most tenuous relation to curriculum course work. Petitioners maintain, for example, that the chess club is "related" to math and science classes because it "contribute[s] to academic performance" in math courses (Br. 75) and "enhances students' ability to engage in critical thought processes" (*id.* at 18-19). And petitioners claim that Zonta and Interact, community service groups affiliated with Rotary Clubs, relate to social studies classes because they "promote[] effective citizenship" and because students have occasionally received extra credit for particular service projects (*id.* at 19-20). Petitioners also attempt to tie the chess and service clubs to certain broadly defined "goals" of the WHS curriculum, such as "train[ing] good citizens" (Pet. Br. 77), "enhanc[ing] . . . critical thought processes" (*id.* at 18-19), and nurturing "life-long commitments to community service," rather than leaving this "to the happenstance of private conscience" (*id.* at 76-77).[32]

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[32] School districts in other parts of the country have shown comparable ingenuity in concocting connections between student-initiated activities and the curriculum. In *Garnett*, for example, during the pendency of the controversy the chess club was renamed the "Advanced Strategy and Tactics Club," apparently in order to make it appear more "curriculum-related." Dep. of D. Allen, at 5, 13-14 (Exc. 226). In *Burr*, the Buffalo, New York, school district has taken the position that every one of the 277 student clubs on the district's 1987-88 roster is "curriculum related," including such clubs as "Dungeons and Dragons." "Dungeons and Dragons" is justified on the following theory:

> [T]he club may properly be characterized as an 'intellectual games club' because the types of games that are played involve critical thinking, analysis, planning and advanced strategy. Simple games which may be utilized to "pass the time" are not a part of this club. The club draws on the above course concentrations [mathematics and logic, social studies, science fiction, mythology, and science] to enhance these thinking skills. Additionally, Dungeons and Dragons members develop organizational skills such as material arrangements, score keeping, and won/loss totals.

School Board's Answers to Defendants' First Set of Interrogatories, at 84-85 (Sept. 1989), in *Board of Education* v. *Burr*, No. 11097/88 (Sup. Ct., N.Y., filed Nov. 15, 1988).

It is difficult to conceive of a student club that could not fit within such an elastic definition of "curriculum." For example, participation in a political-party club (which petitioners seem to concede would be "noncurriculum related" (Pet. Br. 91)) would doubtless "provid[e] an understanding and appreciation of government processes"—the justification that petitioners offer for labeling participation in student government "curriculum related" (*id.* at 17)—and "contribute[] to academic performance" in political science classes by enhancing a student's awareness of political issues and current events.[33]

Indeed, on cross-examination, petitioner school officials admitted that respondents' proposed Bible study club would itself satisfy their test for curriculum-relatedness. They testified that the Bible club could "relate" to courses in English literature, history, sociology, or psychology

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[33] Significantly, petitioners appear to concede that the roster of student clubs in the *Bender* case constituted an "open forum" (Pet. Br. 43 n.18), but the clubs in *Bender* are virtually the same as the clubs here. See *Bender* v. *Williamsport Area School Dist.*, 741 F.2d 538, 543-544 n.8 (3d Cir. 1984), vacated on standing grounds, 475 U.S. 534 (1986). In *Bender* there were about 30 student groups, including Student Government, Key Club (a Kiwanis-sponsored community service club analogous to Interact), Business English Club, Future Homemakers of America, Vocational and Technical Club, Speech and Drama Club, and (at one time) Chess Club. The Third Circuit held in *Bender* that the student activity period constituted a limited open forum (*id.* at 549), even though it rendered judgment in favor of the school board on Establishment Clause grounds. Petitioners' definition of "curriculum related" evidently is so "local" (Pet. Br. 63) that only they can tell when it applies.

(J.A. 228, 235, 320) [34] and could contribute to the school district's goals of developing "good citizenship," "wholesome attitudes," "good human relations," and "social skills" (J.A. 234, 256, 306, 320, 366). This confirms that petitioners' "definition" amounts to pure standardless discretion. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2143 (1988) (condemning "unbridled discretion in the hands of a government official or agency" over free speech); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948).

C. None Of The Supposed "Pedagogical" Reasons Asserted By Petitioners Justifies Content-Based Discrimination In Violation Of The Act

Petitioners have asserted several "legitimate pedagogical reasons" (Pet. Br. 50) for refusing to allow the students to meet. Each of these reasons is in direct conflict with the Equal Access Act. Indeed, petitioners' invocation of these "pedagogical reasons" indicates that the school officials in this case are fundamentally hostile to the very premises of free speech and neutrality toward religion that inspired the Act.

1. *School officials may not deny a fair opportunity to meet on the ground that the speech involved is likely to be "controversial" or unsufficiently "balanced"*

Under the Equal Access Act, a federally funded public high school that allows one or more noncurriculum related student groups to meet is forbidden to "deny equal access or a fair opportunity to, or discriminate against,

[34] There is little doubt that a close familiarity with the Bible could "contribute[] to academic performance" in any of these disciplines. As this Court has recognized, "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities." *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963).

any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. § 4071 (a)). Petitioners claim that respondents' meetings would violate a supposed school rule that student clubs must "present controversial subjects in a balanced way" (Pet. Br. 46).[35] Administration of that rule requires school officials to decide what subjects are "controversial" and what range of opinions constitutes "balance." That is content-based discrimination of a most fundamental and pernicious sort, and is prohibited by the Act.[36]

[35] It is open to serious question whether petitioners really have any consistent policy of seeking "balanced discussion." For example, sociology students were required to attend a presentation by Planned Parenthood concerning birth control methods (*e.g.*, J.A. 95-96)—surely a controversial subject—yet there is no indication that an opponent of birth control was invited to respond. Likewise, although local businessmen addressed the Future Business Leaders of America Club (J.A. 354), it is fair to assume that neither the faculty sponsor nor a rebuttal speaker presented club members with questions about the legitimacy of the free enterprise system. In fact, the testimony shows that, far from maintaining Olympian detachment, Westside teachers regularly expressed in class their personal convictions, and that the students understood them as such. J.A. 126-127.

At other school districts that have taken the same legal position as that espoused by petitioners here, student organizations such as Students Against Drunk Driving, the environment club, and the Minority Student Union were allowed to meet without any requirement that their speech be "balanced."

[36] We do not necessarily claim that the Westside school officials are engaged in *viewpoint* discrimination; thus their protestations that their actions are not motivated by "hostility to religious viewpoints" (Pet. Br. 53) are beside the point. See also Pet. Br. 53-54 n.22 (denying that petitioners engage in viewpoint discrimination). The Equal Access Act specifically prohibits discrimination on the basis of the "content of the speech at such meetings," which includes subject-matter as well as viewpoint-based discrimination. On the distinctions between content-based, subject-matter, and viewpoint-based discrimination, see Stone, *Content Regulation and the First Amendment*, 25 Wm. & M. L. Rev. 189, 197-200, 239-242 (1983).

Whether a particular subject will be viewed as "controversial" depends heavily on the opinions of the decisionmaker. For example, principal Findley testified that "advocating a particular sexual preference" is "very controversial" but that protesting aid to the contras, nuclear energy, or nuclear war is not. J.A. 283-84. Petitioners betray their own biases when they compare Bridget Mergens and her friends to the Ku Klux Klan or the Black Panthers (Pet. Br. 53), accuse them (falsely) of "fronting for adults committed to a program of indoctrination" (*id.*),[37] and state that their activities are "unreflective of the community values [the school] espouses" (*id.* at 84).

To allow schools to bar "controversial" speech or to insist that all speech be conducted in a "balanced" fashion would effectively repeal the Equal Access Act. The very purpose of the Act is to allow students to discuss issues of religious, political, and philosophical import—subjects that are inherently "controversial." The Senate Report states that the prohibition of content-based discrimination was intended to preclude circumvention by school officials who might claim, as petitioners have here, that they were denying permission to meet not because of the religious content of a student meeting but "to avoid controversy." R. Rep. No. 357, *supra*, at 39.

2. *School officials may not deny a fair opportunity to meet on the ground that all student groups must have faculty "sponsors"*

Every student group at Westside must have a faculty "sponsor." On successive pages of their brief, petitioners claim that assignment of a sponsor would impermissibly "encourage the activities of a religious student club" (Pet. Br. 54), and that sponsors are "a burden many, if

[37] This insinuation is contradicted by the record, which shows that the students formed the group on their own initiative, without any instigation or involvement of pastor, parent or other adult (J.A. 74, 119-120).

not most, clubs would be happy to discard" (Pet. Br. 55). Whichever it is—benefit or burden—Congress anticipated this problem and solved it without any difficulty. Under the Act, schools are free to decide whether or not to assign faculty or other "sponsors," but "employees or agents of the school or government" may be "present at religious meetings only in a nonparticipatory capacity" (20 U.S.C. § 4071(c)(3)). The legislative history confirms that a school may not avoid compliance with the Act on account of a requirement of faculty sponsors. See *Hearings on the Equal Access Act: Hearings on H.R. 2732 before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor*, 98th Cong., 1st Sess. 11 (1983) (statement of Rep. Goodling); *Hearings on H.R. 4996*, *supra*, at 85 (statement of Rep. Bartlett). Consistent with the Act, respondents in this case have stated that they are "willing to oblige whatever the school policy was." J.A. 85; see also J.A. 118-19, 144, 165, 454 (Pretrial Uncontroverted Facts ¶ 15).

There is no basis for petitioners' claim that this would "radically restructure the forum" (Pet. Br. 54). As documented in our Statement of the Case (at pages 5-6), other clubs at Westside also have nonparticipating sponsors. But even if no other club had a nonparticipating sponsor, that would not preclude assigning a nonparticipating sponsor for the religious discussion group.

3. *School officials may not deny a fair opportunity to meet on the ground that it is necessary to avoid the appearance of endorsement*

Petitioners also assert that to allow respondents to meet would create "the appearance of political or religious partisanship" (Pet. Br. 51; see *id.* at 12). Indeed, petitioners opine that the students' request to meet "is nothing less than a request for the School to incorporate religious activities into its official program, and thereby to have school officials endorse participation in the religious club" (*id.* at 84). This is the crux of disagreement in all equal

access cases. We believe (and our entire constitutional tradition holds) that to *allow* free speech is not the same thing as to *endorse* it. Much is done and said on high school grounds, by students, teachers, and others, that the school does not (and would not) endorse. See, *e.g.*, J.A. 264-66, 327 (student newspaper publishes criticism of the school administration and other "controversial" material); J.A. 273 (participants in student government are permitted to engage in "heavy political discussions"). It cannot be otherwise. A high school student from Sonoma, California, put the point this way:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon).

Respondents do not seek preference, but only equal treatment. They do not wish to impose their views on others, but only to engage in discussions among themselves and with those who choose to join them. School officials need have no fear under these circumstances that they will appear to have endorsed the content of the students' speech. Endorsement is not implied by a policy of equal treatment.

In *Widmar*, this Court concluded that granting a religious group equal access to a broadly available university forum does not "confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. The Equal Access Act rests on a similar congressional finding, rendered after detailed investigation, that high school students are sufficiently mature to distinguish a school's tolerance of private religious speech from endorsement of the speech. The Senate Report concluded

that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. No. 357, *supra*, at 35; accord H.R. Rep. No. 710, *supra*, at 4. This "exercise of [congressional] fact-finding powers" (S. Rep. No. 357, at 9) was based in part on the testimony of many witnesses, including high school students, and in part on the expert views of psychologists. Congress's findings of legislative fact are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (citing cases).

Petitioners eventually appear to concede (Br. 91) that under most circumstances, a school does not "endorse" a religious club merely by permitting it to meet like other clubs. But they insist that this case is an exception because of the unique "structure" of Westside's "official student activities program" (Br. 87, 82). Indeed, they go so far as to assert that *anything* that goes on in the Westside student activities program "*is* government speech." *Id.* at 87 (emphasis in original).

These dramatic pronouncements notwithstanding, petitioners have not shown any way in which the existence of the club will actually "'convey a message that religion or a particular religious belief is *favored* or *preferred*,'" *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086, 3101 (1989) (emphasis in original) (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)), or that "'adherence to a religion [is] relevant in any way to a person's standing in the [school] community,'" *County of Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). To the contrary, the trial testimony shows without exception that Westside students—including

those who did not attend the Bible study club—would not perceive the existence of the club as a school endorsement of religion. J.A. 211-212, 214-215, 136-137.

Indeed, the expert witness in this case testified that students would perceive official *hostility* to religion from the exclusion of the club in these circumstances (J.A. 396-397). Dr. Tangdall, the Assistant Superintendent, likewise apparently feared that the students might so construe the school's decision (J.A. 318). The Senate committee considering the Equal Access Act determined such perceptions to be both "reasonable" and widely held by students. S. Rep. No. 357, at 1, 19-20. It stands to reason that treating religion as inappropriate to the forum is more likely to be perceived as hostility toward religion than a policy of equal access and nondiscrimination is to be perceived as favoritism.

If there is any potential for perceived endorsement in the formation of a student Bible group at Westside, it is entirely the product of petitioners' intransigence. The record shows that petitioners have determinedly sought to foreclose every alternative save for complete prohibition of the Bible study club. Petitioners refuse to let the students meet regularly without "official" recognition, although the students would forego such formality if they were guaranteed a regular meeting place. J.A. 451-453, 80-81. Petitioners refuse the "less oppressive alternative" of disclaiming endorsement of the group, even though this alternative is readily available and acceptable to the students (J.A. 429-430, 72-73). See *Hazelwood School Dist.* v. *Kuhlmeier*, 108 S. Ct. 562, 579 (1988) (Brennan, J., dissenting); *County of Allegheny*, 109 S. Ct. at 3115. Most importantly, petitioners insist that with permission to meet *must* come all the trappings—a fully participating faculty sponsor, rights of access to the media, a booth at the Club Fair.

The Court should cut through this nonsense. The Equal Access Act guarantees respondents the right to meet, overseen by a nonparticipating monitor, and this

right alone plainly creates no appearance of endorsement. If the Court finds that the students are demanding other "rights"—such as access to school media—and that these create problems under the Establishment Clause, then those demands should be judged independently on their merits.[38] But the fundamental statutory right to a "fair opportunity . . . to conduct a meeting" on school grounds (20 U.S.C. § 4071(a)) must be upheld.

In *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), this Court advocated "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." The Equal Access Act is a carefully-considered measure by Congress to further that ideal in the context of student-initiated activities in public high schools. Examination of the hearing reports, committee reports, and floor debates shows that the Act was designed for precisely a case such as this. Petitioners ask this Court to eviscerate the Act by allowing its applicability to be determined by the very school officials whose conduct Congress sought to regulate. *Amici* ask only that the Court enforce the statute as written.

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[38] There is no need for this Court to resolve subsidiary issues such as media access in this proceeding. At this point such issues are entirely abstract, and they might never arise. For example, until the day of her testimony respondent Bridget Mergens "didn't know Westside really had a P.A. system because I don't remember it ever being used when I was a student there" (J.A. 83). If these subsidiary issues do arise, they should be considered in light of a full evidentiary record.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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